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646107—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1123

STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 47–52) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1945 (R. 53). The petition for a writ of certiorari was filed on April 7, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the United States is liable for delay to one contractor caused by another contractor on a Government project divided among several independent contractors by separate standard form construction contracts.

2. Whether, under a standard form construction contract, a contractor may recover compensation in addition to the contract consideration, when the contractor has entirely disregarded the administrative procedure outlined in the contract with regard to the extra work on which the claim is based.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, *infra*, pp 13–16.

STATEMENT

On December 30, 1931, the Joseph A. Holpuch Company entered into a general contract (No. VAc 110) with the United States for the construction, for a consideration of $788,600.00, of a Veterans' Administration hospital building and nurses' quarters at Leavenworth, Kansas (Fdg. 2; R. 34).[1] The contract did not cover mechanical trades work such as plumbing, heating and certain other necessary matters in connection with the construction of the hospital (Fdg. 2; R. 34). On

[1] The contract was Standard Form No. 23, approved by the President on November 19, 1926 (R. 24).

January 8, 1932, petitioner became surety for the performance by the Holpuch Company (Fdg. 2; R. 34). Simultaneously with the Holpuch Company contract, the United States entered into a contract with the P. H. Meyer Company for certain portions of the mechanical trades work mentioned above and not covered by the general construction contract (Fdg. 18; R. 45).

Under the Holpuch contract, construction was to commence within 15 calendar days after notice to proceed and was to be completed within 300 calendar days thereafter (Fdg. 2; R. 34). The Meyer contract provided that work should "be commenced promptly after date of receipt of notice to proceed' and "be completed at a date not later than that provided in the contract for General Construction" (Fdg. 18; R. 45).

Notice to proceed was received by the Holpuch Company on January 18, 1932, and work was begun on February 2, 1932 (Fdg. 2; R. 35). In accordance with the terms of the contract, the work was to be completed by November 13, 1932 (Fdg. 2; R. 35). On April 1, 1932, the Holpuch Company's right to proceed with the work was terminated by the contracting officer under Article 9 of the contract, on the ground that the Company was not proceeding with sufficient diligence to insure completion within the agreed time (Fdg. 4; R. 37).

The Holpuch Company took no appeal to the department head, as provided by Article 15 of its

contract, from the termination decision of the contracting officer.[2] Instead, pursuant to a conference held in Washington, D. C. between a representative of the Company, a representative of the petitioner and the Government's contracting officer, petitioner undertook to complete the work under the terms of the original contract (Fdg. 5; R. 37). Under the arrangement, petitioner appointed a general superintendent or manager for the project (Fdgs. 5, 9; R. 37, 39). Further, petitioner entered into a contract with the Holpuch Company whereby the Company agreed to perform work originally agreed to be performed, including changes past and future, but not including work already performed, all at the original contract price as amended, and petitioner agreed

[2] The Holpuch Company brought suit for damages in the Court of Claims against the United States, alleging that this termination constituted a breach of contract. *Joseph A. Holpuch Company* v. *United States*, Court of Claims, No. 43813. The Court of Claims dismissed the petition on the same day that judgment was rendered in the instant case, holding that the suit was foreclosed by the Holpuch Company's failure to pursue the administrative appeal procedure set forth in Article 15 of its contract and that, instead of appealing the decision of the contracting officer, the Company had, in fact, acquiesced therein. No review by this Court is being sought in the *Holpuch* case. Accordingly, petitioner's attempt to characterize the termination order as improper by an oblique reference to the commissioner's finding, deemed irrelevant by the court below in the *Holpuch* case (Pet. 2, Br. 25), and its reference to an offer of data by the Holpuch Company to prove its ability to complete the work (Pet. 3), are entirely unsupported by the record herein.

to pay over the contract consideration to the Company (Fdg. 5; R. 37–38).

The construction was substantially completed by June 30, 1933 (Fdg. 6; R. 38). The full contract price was received by petitioner and turned over to the Holpuch Company (Fdg. 6; R. 38).[3] In connection with certification for final payment by the General Accounting Office, petitioner was relieved from payment of liquidated damages, theretofore assessed in accordance with the provisions of Article 9 of the contract, for 229 days' delay beyond the agreed contract time for completion of the work (Fdgs. 6, 19; R. 38, 46).

Petitioner protested the nonpayment of various claims indicated by a statement attached to its final voucher (Fdg. 19; R. 46). A number of the claims thus itemized became the subject matter of its suit in the Court of Claims. With the exception of an award of damages to petitioner for plaster repair and brushing necessitated by a temporary failure of steam heat required to be furnished by the Government under the contract (Fdgs. 13, 14; R. 42–43, 50–51), the Court of Claims denied recovery to petitioner after detailed consideration of the numerous items of the claim (Fdgs. 7–18; R. 38–46, 47–52).

[3] Pursuant to the arrangement under which petitioner performed the contract, $5,130 was paid by the Government directly to the Holpuch Company for work done prior to the termination order.

Petitioner urges only two of the claims made in the court below in the instant application for certiorari. The first of these is an item, stated in the complaint below to amount to $65,013.76,[4] which petitioner seeks to charge against the United States for an alleged 333 days'[5] delay caused to it in the performance of its contract (R. 16–20, 22–23). The lower court carefully examined this claim and found that petitioner had been delayed as a result of lack of diligence by the Meyer Company, the mechanical trades contractor mentioned above (Fdg. 18; R. 45). The Meyer Company contract was terminated by the Government on March 31, 1933, approximately three months before petitioner's completion of the entire construction job (Fdg. 18; R. 45). The Government itself completed the mechanical trades work with some resulting additional delay to petitioner (Fdg. 18; R. 45). However, the court found no showing by petitioner as to the amount of delay caused by the Meyer Company or the amount caused by the Government, and

[4] Petitioner refers in its instant application to an amount of $54,810.27 as the amount of delay damages "proven" by it (Pet. 5). The record contains no specific sum other than that alleged in the complaint, and the Court of Claims found no damage or delay period proven.

[5] Petitioner here claims 352 days as the delay period (Pet. 4), and refers to a ruling of the Veterans' Bureau. Neither claim nor reference has any basis in the record (Fdg. 18; R. 45–46, 52) and petitioner's statement that there is no dispute as to the extent of the delay (Br. 10) is footless.

further found that petitioner failed to show the damage resulting from the Meyer Company delay and from the Government's delay (Fdg. 18; R. 45–46). In its opinion, the court held petitioner not entitled to recover from the Government for delays caused by the Meyer Company, and further denied recovery in connection with any delay caused by the Government because of petitioner's failure of proof as to the amount of the delay or the damages caused thereby (R. 52).

The further claim made in the court below by petitioner, and also urged here, involves an item of $13,403.97 on account of "furring" not shown by the drawings (Fdg. 15; R. 43–44). The "furring" in question was done by petitioner at the direction of the Government's superintendent of construction (Fdg. 15; R. 44). This claim was denied by the lower court on the ground that petitioner had failed to comply with the requirement of Article 5 of the contract with regard to obtaining an appropriate order in writing from the contracting officer (R. 51).[6]

[6] In addition to delay damages and the "furring" claim, petitioner sets forth, in the instant application, a $13,809.73 wage claim, said to have been caused by failure of heat, delay caused by the Meyer Company and delay caused by the Government (Pet. 6–7). As petitioner states, this item was not discussed in the opinion below. Nor does it appear in the record. Petitioner describes this claim as dependent on its "main" argument in connection with delay damages (Br. 21). For this reason and because of its obscure basis, the claim will not be discussed in this brief.

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ARGUMENT

We submit that the questions which petitioner here seeks to raise were correctly decided by the Court of Claims in accordance with controlling decisions of this Court.

1. *Claim for delay damages.*—Petitioner, contending that the United States is liable to it for delay caused by the Meyer Company (Pet. 1, Br. 8), challenges the ruling of the court below that it was "* * * clearly not entitled to recover from the defendant [the United States] damages for delays caused by an independent contractor, and not involving any fault on the part of defendant. * * *" (R. 52.) In urging review by this Court, petitioner describes this ruling as the "bold" announcement of a new rule of law, unsupported by logic and contrary to all reported decisions.[7]

It is well established by decisions of this Court, under similar or identical contracts, that the Government neither expressly nor impliedly guarantees a contractor against delays caused by other contractors engaged in performing portions of a

[7] Petitioner seeks to buttress its position in this respect by referring to a so-called admission in the Government's brief below (Br. 8, 9). But the sentence complained of was a mere recognition of the Government's liability where it has broken a contract by delay, not a concession that such a breach had occurred. Moreover, the statement, made in connection with a defense that petitioner suffered no damage by reason of its contract with the Holpuch Company (see R. 48), has no relevance to petitioner's instant assertion of governmental liability.

single Government project. *Crook Co.* v. *United States,* 270 U. S. 4; *United States* v. *Rice,* 317 U. S. 61; cf. *United States* v. *Blair,* 321 U. S. 730, 731–734.[8] Governmental liability was denied in the *Crook* and *Rice* cases where the delay resulted from the exercise of the Government's power to issue change orders.[9] Petitioner's claim of Government liability herein, for delay caused by the Meyer Company, appears *a fortiori* governed by such decisions. Thus, far from constituting a "boldly announced" novelty, the challenged decision of the court below is squarely supported by, and compelled by, controlling decisions of this Court. Compare *United States* v. *Beuttas,* No. 431, this Term, decided April 23, 1945. Petitioner's contention to the contrary is without merit.[10]

Moreover, it should be noted that petitioner, in urging governmental liability for delay caused by the Meyer Company, has assumed that the necessary showing of delay period and damages attributable thereto was made in the court below. The fact is otherwise. A basic aspect of the rul-

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[8] In both the *Rice* case and the *Blair* case, the contract provisions were identical with those here involved.

[9] As in those cases, petitioner here was relieved from payment of liquidated damages for delay (Fdg. 19; R. 46).

[10] Petitioner refers to certain earlier decisions of the Court of Claims and of various state courts. These decisions were before this Court in the *Rice* case, (October Term 1942, No. 31, Pet. Br., p. 17, fn. 3; pp. 19–20, fn. 5), and obviously cannot be taken as reflecting the federal rule in the light of the decision in that case.

ing of the Court of Claims consists of its finding of fact (R. 45–46), that petitioner failed to sustain its burden of proving the periods of delay attributable to the Meyer Company or to the Government, or the consequent damages. This burden was clearly upon petitioner, *Ripley* v. *United States,* 223 U. S. 695, and, in the absence of record evidence to the contrary, the findings of the court below are conclusive. Cf. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206.

2. *Claim for extra "furring".*—Petitioner's claim for "furring" expense was also properly rejected by the Court of Claims. Its decision was rested on petitioner's noncompliance with the express requirement of Article 5 (Appendix *infra,* p. 14), that a proper order in writing be obtained from the contracting officer for extra work.

We submit that the decision below was clearly correct and is fully supported by decisions of this Court. *United States* v. *Blair,* 321 U. S. 730; *Plumley* v. *United States,* 226 U. S. 545; cf. *United States* v. *Callahan Walker Co.,* 317 U. S. 56; *United States* v. *John McShain, Inc.,* 308 U. S. 512; *Hawkins* v. *United States,* 96 U. S. 689, 697.[11] The wisdom of requiring strict com-

[11] Though the court below considered the furring as extra work barred by petitioner's want of compliance with Article 5 (R. 51), additional bases for denial of the claim exist. With regard to furring not shown on the drawings, the contract specifications required all pipes to be covered, furred in, and plastered (Fdg. 15; R. 43–44). This general require-

pliance with the administrative procedure contained in standard Government contracts has been recognized by this Court. Only by such compliance can the Government be accorded an "opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers." *United States* v. *Blair, supra,* p. 735.[12] Here the court below has found that petitioner failed to comply with the contract provisions both as to orders in writing under Articles 3 and 5 and submission of disputes and appeal under Article 15 (Fdg. 20; R. 47). The record is barren of any showing that compliance with the requirements of the contract was impossible or futile. Petitioner's naked allegation that cost could not be determined in advance (Pet. 6), even if established, furnishes no justification for noncompliance with contract procedure. Nor can the

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ment appears to bring all "furring" work within the terms of the contract. Further, with regard to the furring of pipes whose location was changed by reason of discrepancies in drawings, Article 2 of the contract (Appendix, *infra*, p. 13) requires drawing discrepancies to be submitted to the contracting officer without whose decision such discrepancies shall not be adjusted save at the contractor's own risk and expense. Petitioner did not comply with this contract requirement (Fdg. 15; R. 44).

[12] Petitioner's claim in the court below furnishes a specific illustration. In connection with a claim for the cost of installation of access panels, installed by petitioner without regard to contract procedure, the Government's officers ruled that such panels should not have been installed when the matter finally came to their attention (Fdg. 9; R. 39).

contention that the changes were unanticipated (Pet. 6) help petitioner, since Articles 3 and 5 are designed to cover unanticipated work. *United States* v. *Rice, supra,* p. 68. Conduct such as petitioner's cannot be allowed to deprive the Government "* * * of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims * * *." *United States* v. *Blair, supra,* p. 735; cf. *United States* v. *Callahan Walker, supra,* p. 61.

CONCLUSION

The decision below presents no new question of importance and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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